FOR THE DEFENSE

The Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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A VIEW FROM THE BOX SEATS

By Russell G. Born

As many of you know, our office has started conducting in-house mock trials and cross-examination workshops. Whether participating as a juror or instructor, my observations were always made while sitting in the jury box. Watching the attorneys emphasized just how important it is for lawyers to be aware of the dynamics of the courtroom, specifically, the use of diagrams, notes, voice projection, and physical presence.

Critical to the successful use of a diagram is its location in the courtroom. Every juror in the box has already denied having any serious vision problems. This, however, does not mean they all have 20-20 vision. If you refer to a diagram or chart positioned at the other side of the courtroom, do not expect the jurors to be able to see it. Moving it up three to four feet does not help! Remember, every juror sitting in the back row is already five to six feet from the edge of the jury box. When a diagram is ten feet away from the box, the back row is already straining to see it. The purpose of the diagram is to clarify and accentuate favorable testimony, not to make the jurors think they should see an optometrist. Before you go to trial next time; set up one of your diagrams, sit in the jury box, and then decide where to place it.

Then there is the "use of the notes" controversy. Most attorneys use notes during opening and closing. There is nothing wrong with using them as long as you have the right place to set them down. You should not have to walk all the way back to the defense table in order to refer to them. Invariably, while walking back to the defense table, you turn your back to the jury and keep talking. Jurors do not listen to someone who is walking away from them! Too many round-trips between the jury box and the defense table leaves the jury with the impression that you lack confidence or are unprepared.

What do you do with your notes? One solution is to set them on the end of the prosecutor's table. This allows ready access without turning your back to the jury. It also invades the prosecutor's space showing the jury that the whole courtroom belongs to you. However, even this solution sometimes finds you looking down at the table shuffling through papers.

A better solution may be the use of a podium. Sure, I hear you grumbling! Podiums are too formal, stifling, they do not fit your style.... That is true, if all you do is stand behind them and read from your notes. Podiums, however, can be a great demonstrative tool. Pound on them to make a point, lean over them to emphasize your speech, or grab the sides and preach from them if you have to. The podium will serve as a focal point for the jury while you glace at your notes. Remember, you do not have to stay behind the podium! When you need your notes, you simply take two to three steps back and the podium is at your side. You have kept the jury's attention, wasted very little time; and if you now need to change direction, use the podium as an instrument of transition.

Voice projection and physical presence also have an impact upon the jury. You may be an attorney who stays seated during direct and cross-examination. Perhaps this is done to appear non-threatening towards a particular witness, or you simply feel more comfortable being seated. Unfortunately, from a juror's perspective, several problems arise.

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Everyone suffers minor hearing loss as they get older. Couple this with some of the wonderful acoustics found in the courtrooms, and you realize that the jurors' job of listening is not always easy. Therefore, voice modulation and projection is critical and should not become problematic through lack thereof.

If you remain seated, your voice does not project, especially if you are looking down at your notes while asking the questions. The jurors miss half of what is said, and any intended dramatic impact is lost! Jurors watch *L.A. Law*, *Rosie O'Neil*, and *Equal Justice*. They want to see you stand up and take charge of the courtroom. You cannot do that if you are sitting down, mumbling questions, and rocking back and forth in a chair.

During direct examination, stand between the jury box and the prosecutor's table. This allows your witness to look at the jury. It is more comfortable for your witness, and the witness appears more relaxed to the jury. Physically, you have now come between the prosecutor and the jury, cutting the prosecutor out of the visual loop between your witness, the jury, and you. The jury feels your presence!

Presence is even more important during cross-examination. You cannot have it sitting down! If you anticipate using a diagram for impeachment, get close enough to the witness to reduce your walking back and forth. Further, if you intend on being dramatic and want to be the focus of attention, position yourself several feet in front of the prosecutor's table! Just by being closer to the witness, you have once again cut the prosecutor out of the visual loop and the jury is watching you.

The topics of diagrams, notes, voice projection, and physical presence are all raised by jurors during their deliberations. A few stylistic changes in these areas will greatly improve your courtroom presence. The next time you are preparing for a trial, walk down to the courtroom and get a view from the box seats. ^

RESTITUTION WOES

By Garrett W. Simpson

When a client signs a plea agreement that limits restitution to no more than a fixed amount, trial lawyers should take care to have the plea agreement specify that the plea agreement's "cap" on restitution means that no fine will be imposed. If that stipulation cannot be reached, the client must understand his true financial exposure.

In a plea case where there was no stipulation on restitution, State v. King, 157 Ariz. 508, 759 P.2d 1312 (1988), our supreme court held that a fine of up to $150,000.00 can be imposed as restitution pursuant to A.R.S. 13-801(A) and 804(A), even if the plea was to a Class 5 felony theft, which would otherwise jurisdictionally limit restitution to $500.00.

In at least one unreported memorandum decision, the Court of Appeals recently held that even an agreed $2,000.00 cap on restitution is not a bar to the trial court's imposition of up to an additional $150,000.00 in fines to be paid as restitution. The reasoning is that since all clients pleading to a felony are routinely told they can be fined up to $150,000.00, they are knowingly and voluntarily taking that risk. The order that the fine will be paid as restitution under 13-804 is irrelevant to the defendant's decision to plead guilty, according to that decision. Although that issue is on review to the Arizona Supreme Court, the common cap on restitution is likely illusory.

Finally, State v. Georgeoff, 163 Ariz. 434, 788 P.2d 1185 (1990), requires that ALL alleged breaches of plea agreements be first raised in the trial court. If you think the prosecutor, probation officer or court is violating agreed-upon restitution provisions, or any aspect of your client's plea agreement, you must object NOW, stating exactly how the plea is being breached and request an evidentiary hearing, if necessary. It is a mistake to think such matters can be remedied by an appeal.

The bottom line is that clients should not rely on a mere "cap" on restitution in a plea bargain to protect them from excessive financial claims in criminal court. ^

THE HITCH TO STOLEN PROPERTY

By Thomas E. Klobas

Occasionally there occurs a situation which could only be the offspring of some twisted law school hypothetical from Ethics 101. Such was the feeling recently when a client charged with theft, attempted to bestow upon the office a trunkload of stolen property. Quick! What would you do?

This dilemma focuses upon both the attorney's duty to the client as well as the attorney's role as an officer of the court. Of special concern are protection of client confidentiality as well as preservation of the lawyer's representation.

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FOR THE DEFENSE

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In 1985, the State Bar issued Ethical Opinion No. 85-4 covering a similar situation. It concluded that the attorney had a duty under ER 3.4 to return the evidence to the prosecution as well as to testify, within limits, upon request as to its source. This was shortly followed by an opinion by the Arizona Supreme Court, Hitch v. Superior Court of Pima County, 146 Ariz. 588, 708 P.2d 72 (1985), which spells out a procedure by which the property could be returned with minimal jeopardy to the client or the lawyer-client relationship.

Under Hitch, an attorney confronted with the situation described above, must first determine whether the property (evidence) is in danger of loss or destruction, while in the hands of the client. If the property is endangered, the attorney should take possession and deliver it to the prosecutor. He or she must then move to withdraw from representation of the client as he or she is now a potential witness as to the origin of the material.

In all other situations, the preferred practice is to have the client keep the property after being advised as to the laws concerning concealment and destruction of evidence. The attorney should then attempt to negotiate return of the property under conditions which protect the client as well as preserve the lawyer-client relationship. The method suggested in Hitch is to enter into a stipulation with the prosecutor whereby the property is to be returned so long as the prosecutor agrees not mention to a jury that the material was recovered from the client. Under these circumstances, there is no need for the attorney to withdraw as counsel.

One suggested scenario would be to have the property transferred from the client to a police officer in the presence of the attorney. A complete inventory of the property should be prepared by the officer with copies provided to the client and attorney.

The strong concern presently expressed for the plight of victims, plus the potential elimination of restitution, should make such a stipulated return of evidence attractive to all concerned. ^

ADMITTING TO PRIORS

By Christopher Johns

You just tried the case and lost. Your client did not testify (or maybe he did) and he has several prior convictions. Now what do you do! Admit them? No!

Too often, unfortunately, prior convictions are admitted without any benefit for the client. For example, a benefit would be to admit to one prior in exchange for the dismissal of others.

Preparation for the trial of prior(s) is often overlooked. We all want to win. However, sometimes we neglect the prior-conviction issue because we do not want to face the prospect of losing (this is probably worse than going to the dentist). Ironically, winning on the priors may be a victory for the client by "beating" the deal. Trials of priors can be won and there is absolutely no benefit to our clients by admitting them without getting something in return. If there is nothing in return, then the State needs to be put to the test and prove the prior conviction(s).

For example, recently Jeffrey A. Williams of our office tried a case with an alleged Arizona prior. He lost the trial; however, the State alleged the wrong date in the charging documents and Jeff argued that issue. That issue, coupled with his cross-examination of an unprepared witness for the State, was enough for the jury to find our client not guilty of the prior conviction. After all, "would you trust the government to do its paperwork correctly"? Here are some other thoughts.

*MOTIONS TO STRIKE PRIOR ALLEGATIONS

A strategic decision can be made as to whether to strike the prior by motion before trial. If adopted, a new amendment to criminal procedure rules circulated by the Arizona Supreme Court for comment will create Subsection 19.1(c). It makes it clear that our clients may challenge an alleged prior conviction by a Rule 16 motion. A win here may get you a better deal.

Independently obtaining prior records is always good if possible. If not, obtaining them early from the prosecutor may give you the additional time for a thorough examination. In one of my own cases I found a class 6 felony that had been designated as a misdemeanor in a later proceeding by the court, however, it was still alleged as a prior conviction by the prosecutor. Other grounds may include certain class 4 opens as written about by Brian C. Bond in our June newsletter ("When is a Felony Not a Felony?").

A close examination of the alleged prior documentation, especially for out-of-state convictions, can reveal missing elements of proof. For example, in State v. Dawes, 156 Ariz. 526 (1987), the court found that there was no factual basis for one of the defendant's priors because there was no proof that he had been represented by a lawyer (or knowingly and intelligently waived counsel) for a Nevada conviction.

Also, remember Rule 15 sanctions for the late compliance with discovery on priors, especially those originating from other states. Case law provides that our clients must receive adequate notice, as required by A.R.S. 13-604(K), of the allegation of prior conviction(s), so as not to be misled, surprised or deceived in any way by the allegations. Our clients may be prejudiced if there is insufficient time to review the prior and have our own fingerprint analysis completed where the name and date of birth are at variance. However, the trial court, of course, retains the discretion to allow an allegation of a prior conviction any time prior to trial. It cannot, however, be alleged after a verdict is returned.

*PROOF OF PRIOR CONVICTIONS

Before a sentence may be enhanced by a prior conviction, it must be either admitted by the client or found to be true by the trier of fact. The State must prove the prior conviction beyond a reasonable doubt. The case is tried to the jury. When the State alleges a prior conviction, it must prove that the defendant in the present case and the person convicted in the prior case are the same individual, and that there was in fact a prior conviction.

(cont. on pg. 4)

A prior conviction is proven by extrinsic evidence, usually in the form of a certified copy of a judgment of conviction. Udall, Law of Evidence, 93 47 (Vol. 1 2d. Ed. 1982). However, in State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985), our supreme court held that the State may prove prior convictions by evidence other than a certified judgment of conviction. For example, out-of-state records containing certified copies of the defendant's photographs and commitment record stating the defendant's crime and sentence.

If the record of conviction fails to show that a client was either represented by counsel or knowingly waived counsel, the conviction may be collaterally attacked, and under such a record the conviction cannot be used to enhance the sentence on a subsequent conviction. However, a prior conviction that is unchallenged in the trial court on the basis that it is uncounseled is entitled to a presumption of regularity for purposes of sentence enhancement. The State may use properly self-authenticated documents pursuant to Rule 902, Arizona Rules of Evidence, or other means to show that the client is the same person previously convicted.

Another issue that arises is whether an out-of-state conviction constitutes a felony for enhancement purposes in Arizona. Whether an out-of-state conviction constitutes a felony or misdemeanor is a question of law to be decided by the trial court.

*THE 609 ISSUES

Do not forget the 609 issues. Rule 609 permits the court to admit evidence of a prior felony conviction to impeach a defendant if the court determines that the probative value outweighs its prejudicial effect. The State bears the burden of proof in establishing the admissibility of the prior conviction(s) for impeachment purposes. It must show the existence of the conviction either by an admission from the defendant or by a public record. Hence, the State must be able to prove the conviction before they can use if for impeachment. Several states also have open-end felonies and often the State does not have the additional documentation showing that the offense was designated a felony. In arguing 609 motions, also consider that introduction for impeachment chills the client's right to take the stand and that any admission by him on the stand thereby relieves the State of proving the conviction beyond a reasonable doubt in a separate jury proceeding. See People v. Chavez, 621 P.2d 1362 (1981) for an excellent discussion on this issue.

Remember, the State sometimes is unprepared to try priors as well! ^

HUNG JURY ON PRIORS

By Jeff Fisher

In a recent case the jury became deadlocked or hung during deliberations in a trial on a prior felony conviction. The court concluded that the jury could not reach an agreement, a mistrial was declared, and the jury was dismissed.

The Arizona Supreme Court has addressed retrial of allegation of prior felony conviction in State v. Johnson, 155 Ariz. 23, 745 P.2d 81 (1987). In Johnson, the jury convicted the defendant of sexual assault. The jury deliberated on the issue of prior convictions, but they could not reach a unanimous decision. The trial court granted advisory counsel's motion for mistrial, and the jury was discharged. Thereafter, the defense opposed retrial on the allegation of prior convictions on two bases. First, that Rule 19.1(b) of the Rules of Criminal Procedure and A.R.S. 13.604(K) provide that the allegation of prior conviction should be tried by the same jury which tried the substantive charge. Second, that retrial would offend the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The court held that another jury should be selected for retrial of the allegation of prior felony conviction. The court reasoned that when a prior felony conviction is reversed on appeal, retrial on the prior felony conviction occurs as a matter of course. State v. Riley, 145 Ariz. 421, 701 P.2d 1229 (App. 1985). Similarly, when a hung jury occurs on the substantive charge, mistrial is declared and a new trial is ordered. Accordingly, this accepted procedure in criminal cases should be followed when a hung jury occurs during the trial of prior felony convictions, notwithstanding the statutory provision for trial of allegation of prior felony conviction by the same jury which decided the substantive charge. A.R.S. 13-604(K). The court was unable to find any reason or policy which would prevent the trial of the allegation of prior felony conviction before another jury.

In addition, the court held that retrial before a new jury of an issue on which a former jury could not reach agreement does not violate double jeopardy principles. Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed. 242 (1984); State v. Weigel, 145 Ariz. 480, 702 P.2d 709 (App. 1985). Therefore, retrial of the allegation of prior felony conviction before another jury does not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. ^

ONE FOR THE ROAD

By Gary M. Kula

It seems like every time a DUI case comes across our desks there are new issues, motions and cases to deal with. You may want to keep the following information in mind for your next case involving an alcohol-related offense.

RELATION BACK REQUIREMENT IN A RECKLESS MANSLAUGHTER CASE

In a written opinion arising out of a Special Action, the Court of Appeals (Division One) concluded that the State's failure to produce relation back evidence in a prosecution for reckless manslaughter does not affect the admissibility of a BAC reading obtained within a reasonable time after arrest. State of Arizona v. Rigsby, 91 Ariz. Adv. Rep. 72 (App. Div. 1, 1991).

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In responding to this decision, it should be noted that the court made a point of distinguishing a Title 13 reckless manslaughter offense from a former Title 28 DUI offense which required relation back to the time of driving.

The primary issue before the court was whether Desmond requires the State to relate back BAC in a reckless manslaughter prosecution. The court noted that unlike the former DUI statute, the defendant's BAC at the time of the offense in a reckless manslaughter case is not an essential element of the offense.

The issue remains, however, as to the relevance of a BAC result from a test taken some time after an arrest for reckless manslaughter. If it is incumbent upon the State to show recklessness or a state of voluntary intoxication at the time of the offense, a BAC which cannot be related back to the time of the offense, has little or no relevance. The only relevant application of a BAC result in this type of case is to assist the fact finder in determining the amount of alcohol in the defendant's body at the time of the offense. Once this information is known, a decision can be made as to the defendant's condition at the relevant point in time.

In a footnote the court noted its holding produces a result substantially similar to the legislature's recently amended DUI statute in which the burden of producing relation back evidence lies with the defendant. This result would be appropriate except for the critical distinction that the new DUI offense defines the criminal act itself in terms of the amount of alcohol in a person's body within two hours of driving. The offense of reckless manslaughter requires a specific factual finding of recklessness at the time of the offense.

FELONY DUI CLIENTS SENTENCED TO DOC

It is generally known that if our client is sentenced to six months DOC as a term of probation, they will be required to serve six months flat minus the amount of presentence incarceration credit received. In cases where we determine that our client may be an unsuitable candidate for probation, the standard practice has been to advise them to accept either a presumptive or a mitigated DOC term. This advice was premised on the belief that our client, as a first-time felon, would be given the typical preferential treatment given to first-offenders, and would not serve an appreciably longer sentence than if they had accepted the regular six months disposition.

While this may have been sound advice in the past, it no longer is. If you are representing a client in a case in which the felony DUI occurred after September 27, 1990, you may wish to re-think your advice.

For a client sent (not as a term of probation) to DOC for a felony DUI offense occurring after September 27, 1990, the rules and practices as to their term have changed. Regardless of prior felonies, the client sent to prison for a felony DUI will not earn release credits or do two-for-one time. In cases where our clients do not have a prior criminal record and are "model prisoners" they will still be considered a class two inmate for purposes of determining parole eligibility. Unless our client is granted parole, the term will be treated as "flat-time". There is no other provision for early release of a felony DUI inmate. Unlike other felony offenders, especially first-time offenders, who are able to earn release credits and are released on a number of bases during the course of their sentence, felony DUI offenders are not given the same preferential treatment.

While our felony DUI clients are given an opportunity to go before the Parole Board at fairly early stages of their prison terms, it appears that the majority of them are being denied early parole. This is the result of the factors considered by the Parole Board in making their determination. Some of the factors considered are whether or not the inmate has committed this criminal offense on prior occasions, the ability of the defendant to live within the law, and the pattern of the defendant's behavior, including evidence of alcoholism. Just as repetitive offenders are serving flat sentences because of prior similar offenses, it appears that the Parole Board is considering prior DUI offenses, whether felonies or misdemeanors, as evidence of possible alcoholism and proof that the defendant has an ongoing history of the same criminal behavior. Once this information is presented, parole will ordinarily be denied. Other factors that potentially come into play include civil liability if a "repetitive" offender is negligently released and commits a similar offense and also the intervention of advocate groups such as MADD. The practical effect of this policy is that many of our clients who are being sentenced to DOC are serving the majority of their sentence.

Accordingly, while there may be situations in which it still may be appropriate to recommend to a client that he or she accept a straight-out prison term in lieu of the six months DOC and three years probation, it may be best to give that advice a second thought until you calculate the amount of time the client will actually have to serve.

NOTES:

* We will have an in-house advanced DUI seminar in the near future. Information will be circulated.

* In Tucson, a misdemeanor was recently dismissed by a justice of the peace on the grounds that the Legislature did not grant the Board of Regents the authority to create a police department on the University of Arizona campus. The decision is presently before the Court of Appeals. The written order is available. This same argument is equally applicable to the ASU Campus Police.

* If your client's driving privileges are suspended for reasons other than a previous DUI offense or repetitive driving while license suspended convictions, you may wish to consult A.R.S. 28-448(A). While revocations and certain suspensions are indefinite in duration, consider using the provision in this section that prohibits MVD from suspending an individual's driving privileges for more than one year.

* If you have a client under the age of twenty-one charged with misdemeanor DUI, you may want to consider a disposition of A.R.S. 4-244 (34) (A Person Under the Age of 21 Operating a Vehicle While There is Alcohol in Their Body) in those cases where a disposition other than a DUI conviction is appropriate. Although this offense is listed on their driving record, MVD will not take any action as to their driving privileges.

(cont. on pg. 6)

* When resolving first-time DUI misdemeanors, you may want to remember that unless the client is given the alternative disposition (no jail), he or she will not be eligible for a restricted driving permit for the last sixty days of his or her ninety day suspension. In those cases where the summary suspension is not imposed due to an administrative error or a defective implied consent affidavit, you should advise the first-time (misdemeanor) DUI client that MVD will impose a ninety-day suspension upon receiving notice of his or her conviction. ^

JULY JURY TRIALS

July 01

Andrew J. DeFusco: Client charged with aggravated DUI. Trial before Judge Ybarra ended with a hung jury July 08. Prosecutor M. Barry.

Catherine M. Hughes: Client charged with negligent homicide. Trial before Judge Schneider ended July 10. Defendant found guilty. Prosecutor P. Schneider.

Brian R. Salata: Client charged with child abuse. Trial before Judge Sheldon ended July 03. Defendant found not guilty (jury out 50 minutes). Prosecutor R. Campos.

Roland J. Steinle: Client charged with aggravated assault. Trial before Judge Hendrix ended July 03. Defendant found guilty. Prosecutor A. Williams.

July 03

Roland J. Steinle: Client charged with 1 count attempted first degree murder and 12 counts aggravated assault (dangerous). Trial before Judge Sheldon ended July 19. Defendant found not guilty by reason of insanity on all 13 counts. Prosecutor J. Levy.

July 09

James P. Cleary: Client charged with sale of narcotic drug. Trial before Judge Coulter. Defendant found guilty. Prosecutor P. Hineman.

Randall V. Reece: Client charged with burglary. Trial before Commissioner Ellis ended July 11. Defendant found guilty. Prosecutor J. Blake.

July 10

Cecil P. Ash: Client charged with aggravated DUI. Trial before Judge Ybarra ended in a mistrial July 15. Prosecutor D. Wolf.

Eugene A. Barnes: Client charged with possession of dangerous drugs. Trial before Judge Ryan ended July 11. Defendant found not guilty. Prosecutor P. Scott.

July 11

Robert C. Billar: Client charged with attempted murder and aggravated assault. Trial before Judge Dougherty ended with a change of plea on July 12. Prosecutor R. Perry.

William Foreman: Client charged with theft. Trial before Judge Gottsfield ended July 16. Defendant found guilty. Prosecutor L. Schroeder-Nanko.

Timothy J. Ryan and Anna M. Unterberger: Client charged with DUI. Trial before Judge Hendrix ended July 16. Defendant found guilty. Prosecutor B. Miller.

July 15

Brad Bransky: Client charged with 2 counts aggravated assault. Trial before Judge Hotham ended July 17. Defendant found not guilty. Prosecutor M. Barsickow.

James J. Haas and Patricia L. Koch: Client charged with 2 counts sexual assault, 2 counts attempted sexual assault, kidnapping and sexual abuse (all dangerous counts). Trial before Judge Schneider ended with a hung jury on July 24. Prosecutor Scherwin.

July 16

James P. Cleary: Client charged with manslaughter. Trial before Judge Dougherty ended July 24. Defendant found not guilty. Prosecutor J. Sandler.

Robert F. Ellig: Client charged with attempted aggravated sexual assault. Trial before Judge Hall ended July 17. Defendant found guilty. Prosecutor Rodriguez.

Bruce F. Peterson: Client charged with aggravated assault (dangerous). Trial before Judge Southern ended July 20. Defendant found guilty. Prosecutor S. Tucker.

Jeffrey A. Williams: Client charged with aggravated assault (dangerous) with priors. Trial before Commissioner Ellis ended with a hung jury July 19. Prosecutor D. Bash.

July 17

Cecil P. Ash: Client charged with aggravated DUI. Trial before Judge Ybarra ended July 24. Defendant found guilty. Prosecutor D. Wolf.

Peter R. Claussen: Client charged with endangerment. Trial before Judge Howe ended July 18. Defendant found not guilty. Prosecutor V. Harris.

July 18

Tamara D. Brooks: Client charged with aggravated DUI. Trial before Judge Galati ended with a hung jury (5 to 3 not guilty). Prosecutor R. Nothwehr.

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Peter R. Claussen: Client charged with fraudulent schemes. Trial before Judge Hall ended July 24. Defendant found not guilty. Prosecutor D. Conrad.

July 22

Donna L. Elm: Client charged with DUI. Trial before Judge Hilliard ended with a hung jury July 25. Prosecutor P. Howe.

Catherine M. Hughes: Client charged with misconduct involving weapons and possession of drug paraphernalia (in absentia). Trial before Commissioner Ellis ended July 26. Defendant found guilty. Prosecutor P. Davidon.

Anna M. Montoya: Client charged with DUI. Trial before Judge Hertzberg ended with a hung jury. Prosecutor M. Spizzirri.

Karen Marie A. Noble: Client charged with aggravated assault. Trial before Judge Howe. Defendant found not guilty. Prosecutor H. Williams.

July 23

Andrew J. DeFusco: Retrial of July 01 case, aggravated DUI. Trial before Judge Grounds ended July 25. Defendant found guilty. Prosecutor M. Barry.

Jerry M. Hernandez: Client charged with aggravated DUI. Trial before Judge Sheldon ended July 26. Defendant found guilty. Prosecutor J. Walker.

July 24

Karen K. Powell: Client charged with forgery. Trial before Judge Schneider ended July 25. Defendant found guilty. Prosecutor S. Brewer.

July 25

Priscilla E. Forsyth: Client charged with aggravated assault (dangerous) and criminal damage. Trial before Judge Katz ended August 01. Defendant found guilty. Prosecutor T. Glow.

July 29

John Taradash: Client charged with burglary and theft. Trial before Judge Brown ended with a hung jury on August 01 (7 to 1 not guilty). Prosecutor S. Tucker.

July 31

Tamara D. Brooks: Client charged with aggravated DUI. Trial before Judge Hilliard ended August 01. Defendant found guilty. Prosecutor B. Baker.

ARIZONA ADVANCED REPORTS
Volume 89

State v. Aguilar
No. 1 CA-CR 90-944-PR
89 Ariz. Adv. Rep. 52, June 25, 1991 (Div. 1)

Defendant is convicted in city court of DUI. His appeal to the superior court is dismissed for failure to file an opening brief. Defendant then files a petition for post-conviction relief in city court. The petition is denied and defendant files a petition for review in superior court. The superior court denies the petition for review. The defendant then files a petition for review to the Arizona Court of Appeals. The Court finds it lacks jurisdiction. The issues raised in the Rule 32 proceedings are barred on direct appeal to the Court of Appeals by A.R.S. 22-375. As defendant could not appeal these issues to the Court of Appeals, he is not entitled to raise them under Rule 32. Rules 32.9(f) and 31.19 also do not provide for petitions for review from the superior court to the Court of Appeals. Defendant's only remedy was to file a petition for a special action and the Court of Appeals, in the exercise of its discretion, denies review.

State v. Bortz
89 Ariz. Adv. Rep. 56, June 27, 1991 (Div. 1)

Defendant plead guilty to sexual assault. His direct appeal was denied. He filed a petition for post-conviction relief alleging ineffective assistance of counsel. The trial court denied his petition and no further review was sought.

Three years later, defendant filed a second petition for post-conviction relief, presenting new claims of ineffective assistance of counsel. Defendant also filed a motion for a delayed motion for rehearing. The trial judge dismissed the second petition for post-conviction relief. Counsel filed a motion for rehearing. The trial judge granted the motion, ordered an evidentiary hearing and denied relief. Defendant did not file another motion for rehearing. The trial judge also denied the delayed motion for rehearing and defendant filed a petition for review to the Court of Appeals.

Defendant has failed to show that the trial judge abused his discretion in denying the motion for delayed motion for rehearing. He failed to set out any reasons excusing his non-compliance. The motion for rehearing also improperly raised claims not contained in the first petition.

Defendant has also failed to properly preserve his second petition for post-conviction relief. While he did file a motion for rehearing, that motion for rehearing was granted. A second motion for rehearing was required to raise the issues that aggrieved the defendant after the trial judge's final decision.

(cont. on pg. 8)

State v. Kasten
89 Ariz. Adv. Rep. 58, June 19, 1991 (Div. 2)

Defendant is charged with child molestation and related crimes. On the day set for trial, the State moves to continue because the minor victim had run away from home and could not be found. Defendant moved to dismiss. The trial judge granted the motion to continue and set a hearing three days later to determine the victim's whereabouts. Defendant claims that the trial judge erred in granting the motion to continue. Defendant's argument failed because he cannot show prejudice. The prejudice must be to his ability to present a defense, not to the State's ability to make its case.

At the hearing regarding the victim, the trial judge ordered that defendant, defense counsel and the victim's mother could not contact the victim until she had been located and subpoenaed to appear at trial. The court also instructed them to advise the victim to contact the prosecutor if the victim called them. The order precluding access to the victim was within the trial judge's authority to enter protective orders. The circumstances surrounding the victim's departure indicated involvement by the defendant and the victim's mother. No abuse of discretion has been shown.

At the hearing on the victim's whereabouts, the victim's mother would not reveal her daughter's address until she was granted immunity. Defense counsel sought to question the mother after she disclosed the address but the State objected because the question exceeded the scope of the immunity. Three weeks later, defendant moved for an order granting the mother immunity for further questioning. The motion was denied. At trial, the mother invoked the Fifth Amendment. A.R.S. 13-4064 authorizes only the State to request a grant of immunity. The trial court had no independent authority to grant immunity and the motion was properly denied.

After trial, the victim recanted and defendant moved for a new trial. The trial court read the victim's recanted testimony and denied the motion for new trial. There is no form of proof so unreliable as recanted testimony. The trial judge determines the credibility of a recanting witness and no error appears.

Defendant claims that he received ineffective assistance of counsel where his trial lawyer did not move to suppress the defendant's statements to a detective. After an evidentiary hearing, the trial judge found that no ineffective assistance occurred. Defendant's statements were not involuntary and not taken in violation of Miranda. Defendant failed to show ineffective assistance of counsel or that a motion to suppress would have been granted.

Defendant claims that consecutive life sentences under A.R.S. 13-604.01 are cruel and unusual. Consecutive life sentences are neither cruel nor unusual for sexual acts with a 14-year-old victim. The court distinguishes State v. Bartlett on the grounds that this was not consensual and the defendant stood in a parent-child relationship with the victim.

State v. Jackson
89 Ariz. Adv. Rep. 61, June 19, 1991 (Div. 2)

Defendant was convicted after a jury trial for child molestation and similar crimes. Defendant claims he received ineffective assistance of counsel because his lawyer did not seek a plea bargain. A defendant has no constitutional right to a plea agreement and the State is not required to offer one. The record does not indicate that there was any offer. Whether defendant could have obtained a favorable deal is too speculative to serve as a basis for relief.

The State called a psychologist to testify. During cross-examination, the psychologist responded with comments involving the credibility of the victim. The statements made were not direct comments about the victim's credibility but rather were comments about general characteristics of victims of sexual abuse. Further, both comments were caused by defense counsel's questioning and are invited error.

Before trial, the prosecutor used a peremptory challenge to remove the only black person on the jury panel. The prosecutor explained that he struck the individual because he wore a ponytail, indicating a particular attitude. The trial judge accepted this explanation as racially neutral. One defense counsel stated that she did not recall the stricken juror having a ponytail. The court stated that it did not recall the juror but would accept the prosecutor's avowal. The issue is waived on appeal. The issue was only raised after the jury panel had been selected and the rest of the panel dismissed.

During trial, there were questions about blood and semen samples. Defendant claims that the State failed to prove a sufficient chain-of-custody for the samples. No chain-of-custody objection was made and the issue is waived absent fundamental error. To establish a chain-of-custody, the State must show continuity of possession. It need not disprove every remote possibility of tampering. Evidence will be admitted if it is intact and unaltered, unless the defense offers evidence of tampering. The State proved that the items in question were always in the possession of the police. No abuse of discretion has been shown.

The trial judge sentenced defendant to consecutive life terms of imprisonment. The sentence was not cruel nor unusual. A.R.S. 13-601.01 requires consecutive sentences. There is also no abuse of discretion under State v. Bartlett. Defendant, a mature man with an extensive criminal record, forcibly assaulted an 11-year-old girl who had been entrusted to his care.

State v. Buonafede
89 Ariz. Adv. Rep. 24, June 25, 1991 (S.Ct.)

Defendant was placed on probation after pleading guilty to two felonies. His probation was terminated early and his civil rights were restored. He later petitioned for a "finding of rehabilitation" and to set aside the judgment of guilt. There is no statutory authority for any finding of rehabilitation. The effect of this ruling is that restoration of civil rights under A.R.S. 13-907 will never preclude the use of that prior conviction as impeachment evidence under Rule of Evidence609(c). (cont. on pg. 9)

State v. Campa
89 Ariz. Adv. Rep. 29, June 27, 1991 (S.Ct.)
State ex rel Romley v. Albrecht
89 Ariz. Adv. Rep. 32, June 27, 1991 (S.Ct.)

Defendant contended that his prior convictions could not be used to enhance his DUI conviction. A.R.S. 13-604 applies to Title 28 felonies and can be used to enhance the sentences for any repetitive offenses. Any prior felony may be used to enhance a sentence for a Title 28 felony. [State ex rel Romley v. Albrecht presented by James P. Cleary, MCPD].

State v. Diaz
89 Ariz. Adv. Rep. 17, June 20, 1991 (S.Ct.)

Defendant presented a duress defense at trial. The jury was instructed at defense counsel's request with a Hunter instruction. Defense counsel's request for this instruction is invited error and waives the issue on appeal. One may not deliberately inject error into the record and then profit from it on appeal. While this instruction has been considered fundamental error in other contexts, here equity favors the application of the usual rule of invited error rather than the exceptional rule of fundamental error. The court expressly does not decide whether the rule in Hunter applies to duress cases as it does to self-defense cases.

State v. Everhart
89 Ariz. Adv. Rep. 73, June 27, 1991 (Div. 2)

In passing sentence, the trial court ordered that the sentence in this case run consecutively to a sentence imposed in federal court. A.R.S. 13-116 does not bar consecutive sentences for successive prosecutions in separate jurisdictions. It only applies to multiple prosecutions under state law.

State v. House
89 Ariz. Adv. Rep. 64, June 25, 1991 (Div. 2)

Defendant pleads guilty to child molestation and is sentenced to the presumptive term of 17 years. Upon consideration of evidence produced in motion to modify the sentence under Rule 24.3, the trial judge resentenced defendant to a mitigated term. Rule 24.3 allows correction of unlawful sentences. The sentence in this case was lawful and the court had no jurisdiction under Rule 24.3 to resentence the defendant. Defendant's remedy would have to be pursued under Rule 32.

State v. Johnson
89 Ariz. Adv. Rep. 43, June 25, 1991 (Div. 1)

At the beginning of trial, the judge gave the jury a proper reasonable doubt instruction. The next day, the jury heard closing argument. The trial judge then told the jury that it would not repeat the instructions that it had given at the beginning of trial, including the reasonable doubt instruction. The trial judge also instructed the jury that their decision of guilty or not guilty must be based upon their conviction beyond a reasonable doubt, whatever that conviction. The jury had a written copy of all instructions available during deliberations. Defense counsel did not object to the failure to reinstruct the jury on reasonable doubt.

Failure to give a reasonable doubt instruction after closing argument and the erroneous instruction did not require reversal where (1) the trial is not a lengthy one, (2) the jury was given a proper instruction when trial began, (3) the jury is reminded of the State's burden in closing argument and (4) the jury is provided with a written copy of the instructions. The court found that the failure to reurge the reasonable doubt instruction and the giving of the erroneous instruction were harmless error under the circumstances of this case.

In dissent, one judge notes that apparently only one trial judge follows this practice. Failure to give the reasonable doubt instruction after closing arguments is fundamentally unfair, and compounded in this case by the other improper instruction.

State v. Kemp
89 Ariz. Adv. Rep. 6, June 11, 1991 (S.Ct.)

Defendant is involved in a fatal traffic accident. The police receive defendant's consent to take a blood sample but did not advise defendant of his right to an independent blood test. While the police must take and preserve a separate breath sample for independent testing, blood testing is significantly different than breath testing. Blood tests do not generally destroy the blood sample. However, if a defendant affirmatively requests a separate blood sample for independent testing, law enforcement officials may not interfere with his efforts to obtain the sample.

State v. Western
89 Ariz. Adv. Rep. 3, May 30, 1991 (S.Ct.)

Defendant, a topless dancer, challenges a city cabaret ordinance on the grounds that it is vague and overbroad. The cabaret law defined a striptease performer as a person who appears in "various degrees of undress" and then employs "body motions". The ordinance is unconstitutionally vague with respect to appropriate attire and the prohibited movements. The key provisions are so nebulous that they raise substantial danger of arbitrary and discriminatory application. The ordinance is also overbroad because it criminalizes what the First Amendment unquestionably protects: non-obscene dancing at locations that do not serve alcohol.

(cont. on pg. 10)

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State ex rel Corbin v. Valentine
90 Ariz. Adv. Rep. 13, July 2, 1991 (Div. 1)

Defendant's daughter is accused of racketeering. The defendant's car is seized because the daughter used it in the commission of an offense. The State cannot forfeit the interests of an innocent owner of seized property.

State v. Ellison
90 Ariz. Adv. Rep. 21, July 11, 1991 (Div. 1)

Defendant plead no contest to armed robbery charges. During the factual basis, the prosecutor stated that the defendant simulated that he had a handgun in his pocket at the time he demanded the money. A defendant's gestures and threats can provide a proper factual basis for robbery while armed with a simulated deadly weapon (see State v. Bousley, 87 Ariz. Adv. Rep. 11 where a different department of Division 1 came to the opposite conclusion on similar facts). [Appeal presented by Stephen R. Collins, MCPD]

State v. Figueroa-Soto
90 Ariz. Adv. Rep. 29, July 9, 1991 (Div. 2)

Defendant was charged in separate proceedings with marijuana offenses, conspiracy, illegally conducting a criminal enterprise and money laundering. Defendant insisted on his right to a speedy trial on the enterprise and money laundering charges. After conviction, he asserted that the double jeopardy clause precluded trial on the marijuana and conspiracy offenses. Based upon evidence presented in the earlier jury trial, the court found defendant guilty at a bench trial. The trial judge later then dismissed on double jeopardy grounds under Grady v. Corbin, 110 S.Ct. 2084 (1990). The Court of Appeals reverses the double jeopardy dismissal. While testimony at the first trial established defendant's guilt on the marijuana and conspiracy offenses, guilt on those offenses was not an element of either of the offenses tried first. Grady provides protection against multiple prosecutions. The defendant here voluntarily forewent that protection when he insisted on early trial of the two charges and resisted consolidation of the marijuana charges.

State v. Williams
90 Ariz. Adv. Rep. 24, June 27, 1991 (Div. 2)

Defendant was convicted of aggravated assault arising from a traffic accident. During opening statements, the prosecutor referred to nightmares suffered by the victim's sister and the family's temporary residence at the Ronald McDonald House after the collision. Defense counsel objected to the comments about the nightmare and moved for a mistrial. The failure to object to the comment about the Ronald McDonald House waived the issue on appeal. As to the comments about nightmares, the comment was improper, but not so inflammatory that the trial judge erred in denying the motion for a mistrial.

Prior to trial, defense counsel moved to preclude any reference to the fact that the defendant is a Native American. Defendant was tried in absentia. The court refused to grant the motion but the State indicated that it would caution its witnesses not to refer to defendant's race. One witness testified that her husband stated "those Indians are drunk". Defense counsel moved for a mistrial, which was denied. The jury was instructed that the statements were stricken and to be disregarded. The instruction to the jury cured any harm that may have been caused by the spontaneous statements. Further, the fact that defendant is a Native American was not immediately apparent to the jury because he voluntarily absented himself from the trial.

Defendant claims that his prosecution for aggravated assault was precluded on double jeopardy grounds by his earlier DUI conviction. While the issue of double jeopardy was properly preserved below, the record is devoid of any evidence that defendant was convicted of a DUI offense other than the statement by defendant's counsel. The presentence report also does not reflect a DUI conviction. The record before the court does not support the claim that defendant's double jeopardy rights were violated.

Defendant contends that he was improperly charged with recklessly causing physical injury to the victim while using a dangerous instrument. The prosecution has discretion to determine both whether to file charges and which charges to file. While the prosecutor was unnecessarily evasive as to his theory of the case, both theories were clearly alternative ones under the aggravated assault statute. The confusion on the subject did not in any way render the indictment vague. The prosecutor was also not required to produce evidence of the defendant's specific intent to use his truck as a dangerous instrument.

Defendant claims that the trial judge erred in refusing to appoint an accident reconstruction expert. Defendant did not request that an expert be appointed.

After the indictment, the State filed an allegation of dangerousness and an allegation of a dangerous crime against children. While the grand jury now has authority to consider the issue of the punishment to be imposed under State v. Burge, 167 Ariz. 25 (1990), the prosecutor still has authority to seek an addendum to the indictment for sentence enhancement purposes.

At trial, the State was permitted to present evidence of the defendant's breath alcohol content. Defendant claims that the State failed to show that its expert was licensed to perform breath alcohol content tests under the statute. That statute, however, applies only to DUI prosecution. There was sufficient foundation for the expert's testimony without proving that the expert was licensed under the statute.

Defendant claims that there was an inadequate chain-of-custody shown for his blood sample. The State showed that the doctor gave it to a D.P.S. officer who sealed it and that the D.P.S. criminalist who tested the blood broke the seal. The chain-of-custody evidence was adequate.

(cont. on pg. 11)

Defendant argues that an automobile cannot serve as a dangerous instrument for this DUI related case. Because this defendant was charged with aggravated assault, not DUI, State v. Orduno, 159 Ariz. 564 (1989) does not apply.

The State alleged that this was a dangerous crime against children under 13-604.01. Defendant claims this was error because the statute is limited to crimes where the defendant either intends to harm a child or has some reason to believe the victim is a child. The statute contains no such limitation. ^

Arizona Advanced Reports case summaries are written by Robert W. Doyle and prepared for use by Maricopa County Public Defenders.

TRAINING CALENDAR

September 7-8

Arizona Attorneys for Criminal Justice presents a Bill of Rights seminar in Tucson.

September 13-14

Arizona State Bar and Arizona Prosecuting Attorneys' Advisory Council present "Constitutional Law/Victims' Rights Seminar" at the Holiday Inn/Holidome--Peoria Avenue & Interstate 17. 8:30 a.m. to 4:45 p.m. Friday and 8:30 a.m. to 11:45 a.m. Saturday.

September 26

Michael Josephson on Ethics presents "Moral Aspirations" at the Sheraton Phoenix from 4:00 to 6:00 p.m.

October 11

Arizona Attorney General's Office presents "Not Guilty by Reason of Insanity" training. This seminar (designed for judges, prosecutors and defense attorneys) will explain how to handle these dispositions. The seminar will be at the Board of Supervisors' Auditorium from 3:00 p.m. to 4:30 p.m.

October 18

Maricopa County Public Defender's Office and County Attorney's Office present "Sentencing in the 90's: The Need for Alternatives", at the Hyatt Regency from 8:00 a.m. to 5:00 p.m.

November 15

Maricopa County Public Defender's Office presents "Criminal Motion Practice", at the Sheraton Phoenix from 8:00 a.m. to 5:00 p.m. ^

PERSONNEL PROFILES

Helen Brewer began as a secretary in Trial Group A on July 29th following her employment as a legal secretary with Wagner Secretarial. Prior to Wagner, Helen worked at Jacoby & Meyers in Thousand Oaks, California.

Julie Anne Davis, who just completed an internship with our Mesa juvenile office, will begin employment as a part-time office aide in Group C on August 21st.

Michael Sisco started work on July 15th as a summer office aide in Group B.

AND ADIEU TO.....

Peter Claussen who is moving to Flagstaff where he will work for the public defender's office,

Michelle Kahn, a secretary in Group A, who moved to New Jersey as a result of her husband's job transfer,

and *Roger Perry* who is leaving our office to travel and then possibly practice law in Oregon, or teach in New Zealand, or ....., or ....., or ..... ^

THE DEFENSE ATTORNEY

Perhaps the greatest calamity that can befall a human being in our society is to be charged with a criminal offense. Based on mere accusations, the government, through the machinery of criminal prosecution, focuses its formidable powers against the individual. Amassed against the accused will be the prosecutor, the police and often times the general public. The process may rend apart the accused's family, alienate his friends and destroy his own feelings of self worth. He will be forced to undergo public proceedings, many of which he may not understand, and in which the prosecution will constantly point the accusatory finger as if to say "By his deeds, he is no longer one of us." Very often the stakes are high. A judgment against the accused may require him to forfeit his property, his freedom, even his life. Into this breach steps defense counsel. Sworn to protect the client's interests to the best of his ability, defense counsel, too, may incur the wrath of public disapproval, but his solemn oath will require him to provide the best defense the law will allow no matter what the personal costs. Armed with little more than his wits and his knowledge of the criminal law, he will become the voice through which the accused will, in effect, do battle with the awesome powers of his own government. Our adversary system requires no less than that defense counsel become a "brother in arms" to the accused in this battle. Defense counsel must be prepared to stand and fight for his client against public outcry; he must stand and fight for his client throughout his trial; and he must stand and fight for his client at the time final judgment is entered. Such a system is not efficient. It is not designed for "swift justice." Indeed, some would say that it is not designed for "justice" at all. But if posterity judges a free society by how it treats its individual members, it should be of considerable consolation to us all that our system does not require an accused to stand alone. ^

BULLETIN BOARD

Attorneys need to give vacation dates to Carol Miller in Records (ext. 62200) a week before leaving so that no Probation Violation cases will be assigned to any vacationing attorney.

SUBSCRIPTIONS

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